

**OPEN RECORDS AND MEETINGS OPINION
2001-O-04**

DATE ISSUED: May 16, 2001

ISSUED TO: Laurel J. Forsberg, City Attorney, Watford City

CITIZEN'S REQUEST FOR OPINION

On May 8, 2001, this office received two requests for an opinion under N.D.C.C. § 44-04-21.1 from Neal Shipman on behalf of the McKenzie County Farmer asking whether the City of Watford City violated N.D.C.C. §§ 44-04-18, 44-04-19, 44-04-20, and 44-04-21 by refusing to disclose records in the possession of its contractor, by failing to respond to an open records request within a reasonable time, by not holding open public meetings of the city franchise committee, and by failing to post notices or keep minutes of the city franchise committee meetings.

FACTS PRESENTED

The City of Watford City (City) is considering taking over the franchise for delivering electricity to its residents. A franchise committee was formed by the City in July 1999 and last met in March, 2001. Notice was posted in the city hall for franchise committee meetings but the City has not kept copies of those notices. No minutes were made of the franchise committee meetings, but the City has been advised by the city attorney to begin keeping minutes of all future city committee meetings.

In an April 27, 2001, hand-delivered letter to the city auditor, Mr. Shipman requested copies of all notices and minutes of meetings of the franchise committee. Eleven days later (May 8, 2001), the city attorney wrote and had hand-delivered a letter to Mr. Shipman on behalf of the City denying the request because notices were not retained for the meetings and because minutes had not been kept for the meetings.

On April 12, 2001, Mr. Shipman submitted an open records request to the mayor for the following documents:

1. A copy of the recent poll of city residents regarding the possibility of a city-owned electric utility, including a summary of the poll results;

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2. A copy of any contract or other form of written agreement between the City and its advertising contractor; and
3. A copy of any products received from the advertising company and a listing of all products the City expects to receive from the advertising company.

The mayor responded on April 20 stating "[a]s the education campaign is completed and presented it will be public 'record'. The only information the city has that you requested in your letter is the recently received 'product', copy of which is enclosed." Letter from William Bolken to Neal Shipman (April 20, 2001). In response, on April 23 Mr. Shipman renewed his request for the results of the poll and other records, and again asked that any denial be in writing and explain the legal authority for the denial.

Mr. Shipman was then contacted by the city administrator. Although the City and Mr. Shipman appear to have slightly different memories of the conversation, the essence of the administrator's response appears to be that the results of the poll were preliminary and not yet ready for publication.

On April 27, the mayor responded in writing. He maintained that the City was not denying his request, but merely indicating that the City did not have the records Mr. Shipman was requesting. After referring to N.D.C.C. § 44-04-18(8), the mayor concluded: "as information is received by the City and becomes public record under North Dakota law, it will be available to the public."

ISSUES

1. Whether the City violated N.D.C.C. §§ 44-04-19, 44-04-20, and 44-04-21 within the last thirty days by holding a meeting which was not open to the public, not preceded by public notice, and not accompanied by written minutes.
2. Whether the City violated N.D.C.C. § 44-04-18 by failing to respond to a request for copies of the notices and minutes of meetings of its franchise committee until eleven days after the request was made.
3. Whether the City violated N.D.C.C. § 44-04-18 by withholding records in the possession of its contractor.

ANALYSES

Issue One:

Mr. Shipman has alleged a number of violations by the City's franchise committee. The definition of "governing body" for purposes of N.D.C.C. § 44-04-19 is not limited to a city council itself; it also includes other groups, particularly committees, which are meeting pursuant to authority delegated to that group by a city council. N.D.C.C. § 44-04-17.1(6). Under this definition, meetings of the city franchise committee would be subject to state laws regarding open meetings. See N.D.C.C. §§ 44-04-19 (open to the public), 44-04-20 (notice of meetings), 44-04-21 (minutes). However, N.D.C.C. § 44-04-21.1 authorizes this office to review only those alleged violations which have occurred within the 30 days preceding this office's receipt of the opinion request. The City indicates that the last meeting of the franchise committee was in March, which is more than thirty days before the date of the request for this opinion. Therefore, it is my opinion that the city franchise committee has not violated N.D.C.C. §§ 44-04-19, 44-04-20, or 44-04-21 within the last thirty days.

Issue Two:

A public entity must respond to an open records request within a reasonable time, either by providing the requested records or copies or by explaining the legal authority for not granting the request. N.D.C.C. § 44-04-18(7); 1998 N.D. Op. Att'y Gen. O-07 at p. O-43. In this case, roughly seven work days passed from the day Mr. Shipman requested notices and minutes of the City franchise committee meetings until the day the city attorney informed Mr. Shipman that the records did not exist.

"Whether records have been provided within a reasonable time will depend on the facts of a given situation, but a delay of seven working days will be closely reviewed by this office." 1998 N.D. Op. Att'y Gen. O-03 at p. O-13. When there is a legitimate legal question on whether the requested records are open to the public, "it is appropriate to take a reasonable amount of time to consult with the [public entity's] attorney" *Id.* However, legal advice was not required to inform Mr. Shipman that the requested notices and minutes did not exist. It was prudent for the City to request its attorney's advice on whether minutes must be kept of city committee meetings, and a delay might have been authorized if the City was attempting to create minutes of the past committee meetings. However, whatever advice the City received from its attorney on that question would not change its response that the records did not exist. It is my opinion the City violated

N.D.C.C. § 44-04-18 by failing to respond to the April 27 request for notices and minutes within a reasonable time.

Issue Three:

The application of the open records law is not limited to a public entity itself; it also applies to recorded information regarding public business which is in the possession of an "agent" of the public entity. N.D.C.C. § 44-04-17.1(15) ("record" means records in possession or custody of a public entity "or its agent."). For purposes of the open records law, the terms "agent" or "agency" refer to an arrangement in which a public entity "delegates the transaction of some lawful business to another." Grand Forks Herald v. Lyons, 101 N.W.2d 543, 546 (N.D. 1960). See also Forum Publishing Co. v. City of Fargo, 391 N.W.2d 169, 172 (N.D. 1986) ("We do not believe the open-record law can be circumvented by the delegation of a public duty to a third party, and these documents are not any less a public record simply because they were in the possession of [an independent contractor]."). In this case, the City's advertising company has been hired to perform an educational campaign on the City's behalf. Thus, the advertising company is an "agent" of the City for purposes of N.D.C.C. § 44-04-18.

The mayor's initial response on April 20 suggests that the City erroneously believed the open records law did not apply to its contractor. The mayor's second response on April 27 clarifies that the City was relying on N.D.C.C. § 44-04-18(8), rather than the mere fact the requested records were in the possession of its contractor, for its delay in providing some of the records requested by Mr. Shipman.

It is not an unreasonable delay or a denial of access under this section to withhold from the public a record that is prepared at the express direction of, and for presentation to, a governing body until the record is mailed or otherwise provided to a member of the body or until the next meeting of the body, whichever occurs first. It also is not unreasonable delay or a denial of access to withhold from the public a working paper or preliminary draft until a final draft is completed, the record is distributed to a member of a governing body or discussed by the body at an open meeting, or work is discontinued on the draft but no final version has been prepared, whichever occurs first.

N.D.C.C. § 44-04-18(8).

There are two parts to this subsection. The first sentence authorizes a public entity to withhold a record from the public if the governing body for the public entity has expressly directed that the record be prepared and presented to the governing body; in effect, this is

a "right of first review" which exists until the record is given to a member of the governing body or until the first meeting of the governing body after the record is prepared. The first sentence in N.D.C.C. § 44-04-18(8) does not apply in this situation because the governing body of the City did not direct the creation of any particular record; they simply directed the city administration to begin a public educational campaign on the utility issue.

The second sentence in N.D.C.C. § 44-04-18(8) authorizes a public entity to withhold from the public a working paper or preliminary draft as long as the working paper or preliminary draft is being used to prepare a final draft, has been provided to a member of the governing body, or has been discussed at a meeting of the governing body.

The phrases "working papers" and "preliminary drafts" are not defined in N.D.C.C. ch. 44-04 and must be given their plain and ordinary meaning. N.D.C.C. § 1-02-03. As commonly understood, the phrases are generally interchangeable: records that are created and used by a drafter in the process of creating another record. See American Heritage Dictionary 1391 (2d coll. ed. 1991) ("working" means "used as a basis for further work"). Once a draft is no longer being worked on or is distributed to a member of a governing body, the draft and all of the working papers or preliminary drafts leading up to the draft must be disclosed upon request.

1998 N.D. Op. Att'y Gen. O-04 at p. O-23 (emphasis added). Under this definition, source documents which are complete in themselves and obtained by a public entity are not protected (2001 N.D. Op. Att'y Gen. O-02), but notes of a meeting that are compiled by staff of a public entity may be withheld while the notes are being used to prepare draft minutes (1998 N.D. Op. Att'y Gen. O-04). The second sentence in N.D.C.C. § 44-04-18(8) is a "work-in-progress" provision and protects public entities from being interrupted with responding to open records requests for the notes and draft documents they create while preparing a final draft.

The City apparently views the documents created by its advertising contractor as "working papers" for the entire educational campaign which may be withheld until the completion of the campaign or until some of those papers are provided to the City. This is an overly broad interpretation of N.D.C.C. § 44-04-18(8). The "work-in-progress" provision in N.D.C.C. § 44-04-18(8) applies only when the requested material has been created in the course of preparing another record. Disclosure of the final draft and all working papers is required once the record is completed, rather than when the education campaign is completed.

For example, applied in this situation, the survey questions prepared by or on behalf of the advertising contractor are complete in themselves and it is my opinion those questions may not be withheld from the public. On the other hand, the city attorney has assured this office that the responses to the survey questions are currently being used to compile a report which tabulates those responses. Unlike the job applications in 2001 N.D. Op. Att'y Gen. O-02, the survey responses are raw data which have been created by the advertising company or its subcontractor in the course of preparing a record which is still a work in progress. I agree with the City that these responses may be withheld from the public, but only until the report is completed. Once the report is completed, the survey responses are open to the public, even if the records are in the possession of the advertising contractor rather than the City. The City may not continue to withhold the requested records until the conclusion of the education campaign.

The City's responses to Mr. Shipman and to this office indicate that some of the requested records do not exist. I understand there is no written agreement between the City and its advertising contractor and there is no listing of products expected from the contractor. The open records law does not require the City, or its agent, to create records which do not exist. N.D.C.C. § 44-04-18(3). Therefore, it is my opinion that the City did not violate N.D.C.C. § 44-04-18 by failing to produce any records requested by Mr. Shipman which do not exist.

CONCLUSIONS

1. It is my opinion that the City franchise committee has not violated N.D.C.C. §§ 44-04-19, 44-04-20, and 44-04-21 within the last thirty days.
2. It is my opinion that the City violated N.D.C.C. § 44-04-18 by failing to respond to the April 27 request for notices and minutes within a reasonable time.
3. It is my opinion that the City violated N.D.C.C. § 44-04-18 by not providing copies of the survey questions posed during the city-wide poll on the utility question, but is authorized under N.D.C.C. § 44-04-18(8) to withhold the survey responses until the completion of the report which tabulates those responses or until work on the report ceases.

STEPS NEEDED TO REMEDY VIOLATIONS

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No further remedial action is needed to remedy the City's failure to respond within a reasonable time to Mr. Shipman's request for copies of the notices and minutes of the city franchise committee. Either the City or its advertising contractor must provide the survey questions to Mr. Shipman and make the questions available to the public.

Failure to take the corrective measures described in this opinion within seven days of the date this opinion is issued will result in mandatory costs, disbursements, and reasonable attorney fees if the person requesting the opinion prevails in a civil action under N.D.C.C. § 44-04-21.2. N.D.C.C. §44-04-21.1(2). It may also result in personal liability for the person or persons responsible for the noncompliance. Id.

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